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RELIGION IN POLITICS AND THE INCOME TAX EXEMPTION

I. INTRODUCTION

"[T]he power to tax involves the power to destroy . . ."¹ Conversely, the power not to tax involves the power to create or foster. When a government decides that an organization has a purpose that ought to be promoted, but will not be if burdened by the normal incidence of taxation, it may grant a tax exemption in order to foster the valued activity. While most activities are valuable to the society, only a few of them have been viewed as unable to function if subject to general taxation. These include, *inter alia*, charitable, educational and civic organizations. The same reasoning applies to religious organizations. They provide a valuable service to society, and the burden of taxation in all probability would force them out of existence, or at least drastically diminish their ability to function. Religious tax exemptions have been recognized throughout the existence of western civilization.² Nevertheless, in light of the first amendment,³ the tax status of religious organizations has provoked much discussion in the United States.⁴

The current Internal Revenue Code provides a wide variety of tax exemptions for religious, charitable and educational organizations.⁵ Since these exemptions deprive the government of revenue and may have other far-reaching effects,⁶ Congress has attempted to create narrow definitions and stringent conditions which organizations seeking an exemption must meet. One of these conditions is that exempt organizations, including religious organizations, abstain from most forms of activity which may influence political campaigns and legislation.⁷

While limitations on certain forms of political activity as a condition to tax exemption have practical merit, they may be unconstitutional insofar as the

1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

2. See L. Pfeffer, *Church, State, and Freedom* 210 (rev. ed. 1967) (Biblical and Roman times); 2 *Suffolk L. Rev.* 244 (1968) (Colonial background); 54 *Va. L. Rev.* 436 (1968) (English experience).

3. U.S. Const. amend. I provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

4. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943) (Reed, J., dissenting); *Parker v. Commissioner*, 365 F.2d 792, 795 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967) (panel including now Justice Blackmun stating that income of religious organizations can be taxed). See also *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (New York property tax exemptions held valid); Korb, *Do the Federal Income Tax Laws Involve an "Establishment of Religion"?*, 53 *A.B.A.J.* 1018 (1967) (concluding that religious exemptions are unconstitutional); Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 *Colum. L. Rev.* 968, 985-88 (1949).

5. See notes 8 and 9 *infra* and accompanying text.

6. Exemption policy affects the behavior of taxpayers as well as the activities of organizations seeking to obtain or retain an exemption. It creates competitive imbalances between exempt and non-exempt groups providing similar services, and it may create political controversies.

7. See *Int. Rev. Code of 1954*, § 501(c)(3) (excerpted in text accompanying note 8).

political limitations may conflict with constitutional guarantees of free speech, freedom to petition the government, and freedom of the press. Political limitations create especially complex problems when applied to religious organizations, since religions cannot have their "free exercise" rights impeded or be given unequal treatment which may tend to "establish" one religion over another. This Comment will explore the constitutional implications of the political activity limitation to tax exempt status for religious organizations.

A. *The Religious Tax Exemption*

The principal federal income tax exemption for religious organizations is found in Section 501 of the Internal Revenue Code of 1954, which in pertinent part provides an income tax exemption to

Corporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.⁸

It is clear that religious organizations enjoy a broader range of tax exemptions than other groups made exempt by the Code.⁹ This favored treatment reflects both historical¹⁰ and constitutional¹¹ considerations. Although religious organizations are grouped for tax purposes with other types of non-profit organizations, and are generally subject to similar restrictions, it is not clear that Congress specifically intended to bring them within the political limitation contained in section 501(c)(3).

When Congress first incorporated a political limitation into the tax exemption sections in the Internal Revenue Code of 1934, it intended to prevent indi-

8. Int. Rev. Code of 1954, § 501(c)(3).

9. Most contributions to § 521(c)(3) organizations are deductible to the donor under the following provisions: § 170(c) (contributions made income tax deductible); § 2055(a)(2) (bequests made estate tax deductible); § 2522(a)(2) (gift tax deduction). Section 501(c)(3) organizations also are exempted from social security taxes by § 3121(b)(8)(B), although pressure from employees undoubtedly leads many to participate voluntarily. Some religious organizations are exempted specially from filing an information return under § 6033(a)(2)(A)(i).

10. The right to practice one's religion without governmental interference finds its roots in the earliest days of the colonies. Thus, the Supreme Court and Congress have given recognition to the fact that "[w]e are a religious people . . ." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

11. The establishment clause commands that government stand apart from religion and avoid any "involvement" which could lead to government preferences in the religious field. *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). In *Committee for Public Education v. Nyquist*, 93 S. Ct. 2955 (1973), the Court noted that a church tax exemption is a "[f]iscal relationship designed to minimize involvement and entanglement between Church and State." *Id.* at 2976.

viduals from making deductible contributions to exempt organizations for the purpose of having them engage in political propaganda.¹² At the same time, Congress realized that many "legitimate" exempt organizations frequently engaged in political activity in order to foster their exempt purpose, but found drafting a statute which would permit the latter type of activity while prohibiting the former to be an "impossible task."¹³ Recent legislators have viewed section 501(c)(3) limitations as an attempt to prevent exempt organizations from using their exempt status to competitive advantage in the political arena.¹⁴

The Treasury regulations dealing with the political activity limitation contained in section 501(c)(3) delineate both an organizational and an operational test which must be met to qualify for the income tax exemption.¹⁵ The organizational test requires that the charter or certificate of incorporation limit the powers of an organization seeking an exemption to those which further an exempt purpose. Thus, an organization explicitly empowered to endorse legislation would ipso facto be non-exempt. While the organizational test looks at form, the operational test looks at substance; if an organization engages in substantial political activity, it should not be exempt. Such organizations are often referred to as "action" organizations. It is clear that an organization can meet the organizational test but fail the operational, or vice versa. Failure to meet

12. See 78 Cong. Rec. 5959 (1934), and particularly the remarks of Senator Harrison. The political limitation was in part a reaction to the social turmoil of the thirties.

13. *Id.* at 5861 (remarks of Senator Reed).

14. See 115 Cong. Rec. 38,887 (1969) (remarks of Representative Blackburn). This criticism is directed at donors who conduit funds through exempt organizations into groups which have goals that the donor favors. Direct gifts to such groups would not be donor-deductible.

15. Treas. Reg. § 1.501(c)(3)-1(b)(1)(i) (1959) provides in part that "[a]n organization is organized exclusively for one or more exempt purposes only if its articles of organization . . . (a) Limit the purposes of such organization to one or more exempt purposes; and (b) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes."

In addition, Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1959) uses an "operational test" and states that an organization will not exempt "if the organization (a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) Advocates the adoption or rejection of legislation. . . . An organization will not fail to meet the operational test merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation. (iii) An organization is an 'action' organization if it participates or intervenes, directly or indirectly, in any political campaign . . ." and it will not be entitled to exemption. The regulations further define an "action" organization in § 1.501(c)(3)-1(c)(3)(iv) (1959) as one whose characteristics are that "(a) [i]ts main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates . . . the attainment of such main or primary objective . . ." The effect and validity of Treasury regulations are discussed in *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129 (1936).

either test makes the organization non-exempt. Neither test appears satisfactory for evaluating religious organizations.

The organizational test presupposes an understanding of the permissible exempt purposes of a religious organization. Some standard for evaluating a charter is required. Although the Treasury regulations include definitions of most section 501(c)(3) organizations,¹⁶ they do not attempt to define a religious organization. While the regulations require that a religious organization limit itself in its charter to "one or more exempt purposes,"¹⁷ the lack of definition makes this mandate obscure. A circular definition that a "church is a church" is set out in the regulations dealing with the unrelated business tax.¹⁸ The absence of a definition may reflect a government inhibition, in light of the establishment clause, to set up a definition which could well be unconstitutional.¹⁹

Since many of the problems involved in the organizational test can be avoided by careful draftsmanship, application of the operational test has caused the most difficulty. Section 501(c)(3) and the regulations indicate that income exemptions are endangered only if an organization carries on substantial political activity. Some types of political activity are explicitly permissible. The definition of a charitable organization, for example, allows some activity aimed at moulding public opinion.²⁰ For practical purposes, substantial political

16. See Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

17. See note 15 *supra*.

18. Treas. Reg. § 1.511-2(a)(3)(ii) (1958) states that "[w]hat constitutes the conduct of religious worship . . . depends on the tenets and practices of a particular religious body constituting a church." A church or religious organization is included in the term church if it "(a) is an integral part of a church, and (b) is engaged in carrying out the functions of a church" However, the term religious organization as used in § 501(c)(3) is broader than the one formerly used in § 511. *De La Salle Inst. v. United States*, 195 F. Supp. 891, 898 (N.D. Cal. 1961); 6 Mertens, *Federal Income Taxation* § 34.08 (1968).

19. When "[t]he power and authority of the State . . . is put on the side of one particular sort of believers . . ." the establishment clause is violated. *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) (holding that a notary applicant could not be required to declare a belief in God). A basic distinction must be drawn. The government is free to determine what is religious for the purpose of deciding whether legislation serves a secular or a religious purpose in order to avoid favoring a religion or religion in general. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947). However, it cannot readily determine what is not religious because of the establishment clause. It cannot prefer one religion over another, and it must give credence to unorthodox religious views and beliefs so long as they are held with sincerity, in good faith, and do not interfere with a compelling governmental interest. See notes 100 and 111 *infra*.

20. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959) includes the following statement: "The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an 'action' organization"

activity is prohibited, whereas activity which is "incidental" to an exempt purpose is allowed.²¹ The absence of a definition of a religious organization again creates problems, for if activity which is incidental to the exempt purposes is permitted but there is no definition of the exempt purpose of a religious organization, it is virtually impossible to decide whether certain activity is incidental to its exempt purpose. Some activity is clearly prohibited: direct contact with legislators or at least direct urging of the public to do so; forthright stands for or against pending legislation; or an outright endorsement of a candidate for public office. Short of these limitations, however, the operational test remains unclear.²²

Another problem with the operational test is that it creates two classes of religions, for if the exemption is conditioned upon the operational test, "action" religious organizations will be non-exempt while "non-action" religious organizations will be exempted. Such a distinction involves favoring some religions over others.²³

If strictly enforced, the prohibitions contained in the operational test could create a severe crisis for many religious organizations, since although an organization can remain income tax exempt under other provisions,²⁴ the section 501(c)(3) status is essential in order to have contributions made tax-deductible,²⁵ which aspect, in light of the fact that religious organizations do not have income in the ordinary sense,²⁶ is the principal benefit derived from section 501(c)(3) status. This problem was encountered when the Sierra Club, the activist conservationist group, had its exempt status revoked.²⁷ The Senate subsequently considered amending section 501(c)(3) to permit lobbying and communications by such exempt organizations with their members on matters of "direct interest."²⁸ While such an amendment would be an improve-

21. Rev. Rul. 143, 1960-1 Cum. Bull. 192, 193-94 (indicating that an exemption will be allowed when the "principal, primary and predominant purposes, and substantially all of its activities, are devoted to such specified purpose or purposes. Thus, an activity which is in fact incidental, secondary or subservient to an organization's exempt purpose . . . and which, when weighed against the whole of the activities . . . is less than a substantial part of the total, will not ordinarily operate to deny exemption.")

22. Compare note 15 *supra* with note 20 *supra*.

23. See note 19 *supra*.

24. Int. Rev. Code of 1954, § 501(c)(4) et seq. provide income exemptions to non-profit business and civic leagues and labor organizations with few political limitations.

25. Compare § 501(c)(3) with Int. Rev. Code of 1954, § 170(c).

26. Bittker, *Churches, Taxes and the Constitution*, 78 Yale L.J. 1285, 1290-92 (1969). Arguably, since religious and charitable organizations do not make "profits" in the sense that corporations do, they would pay little or no income tax even if they lost the income tax exemption.

27. See 55 Geo. L.J. 1128, 1136-39 (1967). The author argues that lobbying in furtherance of an enumerated exempt purpose should be permitted.

28. Senator Muskie proposed this measure in S. 1408, 92d Cong., 1st Sess. (1971) (reprinted in 117 Cong. Rec. 8518).

ment (by recognizing the reality that religion does play a significant role in our political process),²⁹ it would not solve the problem of construing the statute.

B. Court Interpretations of Section 501(c)(3)

Courts generally have taken a conservative approach when examining requests for tax exemptions, since Congress intended the exemptions for a very limited class. Such a construction is consistent with the necessity of preserving a tax base which is large enough to support governmental activity. Thus, the burden is on the taxpayer to show that he has met all of the conditions necessary to entitle him to an exemption.

In *Better Business Bureau v. United States*³⁰ for example, the Supreme Court refused to allow a social security tax exemption to the petitioner, since the organization was not devoted "exclusively" to improving business ethics, but also sought to create a profitable business community. Hence, it was not devoted exclusively to educational purposes. Similarly, in *Stevens Brothers Foundation, Inc. v. Commissioner*,³¹ construing the provision that no part of the income inure to the benefit of any individual, the court denied an exemption to a family foundation established for charitable purposes because the foundation made loans to the family business, notwithstanding the fact that the family business repaid the foundation. Claims for tax deductions similarly are subject to a narrow statutory construction.³²

The general consistency of approach to matters involving tax exemptions and deductions tends to suffer when the courts are faced with the question of whether an organization fits within the "charitable" definition when it engages in some forms of political activity. On the one hand, the ambiguity of section 501(c)(3) makes it conducive to several constructions. On the other hand, since the cases involving the political limitation do not involve problems of self-dealing, there is a tendency to give a liberal interpretation to it, for the Supreme Court has long held that statutes which favor charities should be liberally construed.³³ This inconsistency is manifested in several cases dealing with good government leagues. In *Seasongood v. Commissioner*,³⁴ the deductibility of a bequest to the Hamilton County Good Government League turned on whether the league had engaged in prohibited political activity.³⁵ While the Tax Court had found that the league carried on propaganda and attempted to influence legislation, the Sixth Circuit reversed, limiting the term "propaganda" as found in the statute to "public address with selfish or ulterior purpose and char-

29. See V.O. Key, *Politics, Parties, Pressure Groups* 116-21 (5th ed. 1964); note 181 *infra* and accompanying text.

30. 326 U.S. 279 (1945).

31. 324 F.2d 633 (8th Cir. 1963), cert. denied, 376 U.S. 969 (1964).

32. See *Cammarano v. United States*, 358 U.S. 498, 504-05 (1959).

33. *Helvering v. Bliss*, 293 U.S. 144, 150-51 (1934).

34. 227 F.2d 907 (6th Cir. 1955).

35. The statute involved was Int. Rev. Code of 1939, ch 1, § 101(6), 53 Stat. 33, which essentially used the language of § 501(c)(3).

acterized by the coloring or distortion of facts"³⁶ and narrowly defining "influencing legislation" to solicitation of contributions "one of the main purposes . . . [being] to influence the passage or defeat of legislation . . . through direct communication . . ."³⁷ with the legislature. Noting that "this remedial statute must be liberally construed to effect its purpose,"³⁸ the court held that an organization could devote five percent of its activities to influencing legislation without risking its exemption.

A case inconsistent with *Seasongood* is *Kuper v. Commissioner*,³⁹ which involved the tax status of a New Jersey chapter of the League of Women Voters. There, the statute was narrowly construed, with the result that time spent by league members in discussing positions on legislation and occasional encouragement of direct contact with legislators rendered the organization non-exempt. Other decisions involving similar organizations have been equally inconsistent.⁴⁰

The diverse reasoning used to construe section 501(c)(3) is illuminated further in cases involving bar and medical associations. In *Dulles v. Johnson*,⁴¹ the Second Circuit found that the activities of the New York County Lawyers Association and several other bar groups were charitable within the meaning of the Code. The holding indicates that such organizations do not benefit their individual members, and that their relations with legislators are not those contemplated by the prohibition in the statute.⁴² *Dulles* was followed in *St. Louis Union Trust Co. v. United States*,⁴³ which sustained the exemption despite an even broader range of activities which could be viewed as beneficial to the individual members or as prohibited political activity.⁴⁴ On the other

36. 227 F.2d at 911.

37. *Id.* at 911-12.

38. *Id.* at 912. Among its activities, the league occasionally endorsed legislation and candidates. It should be noted that the statute under review in *Seasongood* did not contain the express prohibition on participation in political campaigns contained in § 501(c)(3). The league also sent letters to the governor on various issues and made an appearance before a legislative committee.

39. 332 F.2d 562 (3d Cir.), cert. denied, 379 U.S. 920 (1964).

40. Compare *League of Women Voters of United States v. United States*, 180 F. Supp. 379 (Ct. Cl.), cert. denied, 364 U.S. 822 (1960) (holding that the league's endorsement of Marshall Plan and the United Nations barred an estate tax deduction for a bequest made to the league) with *Liberty Nat. Bank & Trust Co. v. United States*, 122 F. Supp. 759 (W.D. Ky. 1954) (holding that similar activities did not bar an income tax deduction for contributions to the league).

41. 273 F.2d 362 (2d Cir. 1959), cert. denied, 364 U.S. 834 (1960).

42. *Id.* at 368. The court found regulation of the unauthorized practice of law and the disciplining of lawyers to be public services; similarly the association's endorsement of judicial candidates was deemed to be a public service. Legislative activity was considered aimed at improving the quality of acts and not as attempting to influence legislation. While some lobbying was not of this type, it represented only a "small portion of the total activity" *Id.* at 367.

43. 374 F.2d 427 (8th Cir. 1967).

44. *Id.* at 434-35. The association had lobbied for a new procedure act, worked for a new city charter, sponsored legislation regarding juveniles and adoptions, and had de-

hand, a local organization affiliated with the American Medical Association has been held non-exempt because of the parent organization's lobbying on matters of concern to the medical profession.⁴⁵

The inconsistencies displayed by the courts suggest that philosophical differences as well as different views of congressional intent are frequently salient factors in the outcome of litigation involving section 501(c)(3). *Seasongood* and the bar association cases certainly suggest that an ethical standard has been implanted into the statutes; if the motives and purposes of the organization are deemed sincere and unselfish, the exemption claimed is more likely to be sustained.⁴⁶ The varied opinions indicate that the courts are not satisfied with the substantiality formula which is the essence of the operational test.⁴⁷

Perhaps the ethical test and constitutional questions can explain the greater liberality which the courts have shown to religious organizations claiming tax exemptions. The landmark case in this area is *Trinidad v. Sagrada Orden*,⁴⁸ wherein the Court construed a statute granting an exemption to organizations operated "exclusively" for religious purposes. Although the organization concededly was religious, it sold wine and chocolate at a profit, and had extensive real estate holdings. Nevertheless, it was deemed entitled to an exemption on the grounds that the term "exclusively" merely required that all of the income of the organization ultimately be devoted exclusively to religious purposes.⁴⁹ This type of liberal construction generally has been followed by other courts. Thus, a religious organization can qualify for a section 501(c)(3) exemption even though it runs small businesses in order to show that the golden rule can be used in the business world.⁵⁰ A religious burial society can charge fees to

fended the judiciary from "unjust" public attacks. "This is not propaganda or disqualifying legislative activity of the type referred to in § 2055(a)(2)." *Id.* at 436. The association also ran a referral service, discussed a minimum fee schedule, and was "interested" in the Jenkins-Keogh bill which dealt with deductions for contributions to retirement funds made by self-employed individuals. The court found that these activities did not inure to the benefit of any individual.

45. *Krohn v. United States*, 246 F. Supp. 341 (D. Colo. 1965).

46. This is not to suggest that the "substantiality" test has been rejected in its entirety nor that the courts intentionally have superimposed an ethical standard on the statute.

47. The organizational test has presented fewer problems, since it is fairly simple to examine the charter and bylaws of an organization and determine if it expressly is empowered to engage in influencing legislation. In *Marshall v. Commissioner*, 147 F.2d 75 (2d Cir.), cert. denied, 325 U.S. 872 (1945), for example, the court ruled that a bequest of money for the establishment of trust funds for the promotion of civil liberties, conservation, and economic ideals was not estate tax deductible as a charitable bequest since the will specifically authorized the trusts to draft legislation and seek changes in the existing law. For a similar holding see *Estate of Anita McCormick Blaine*, 22 T.C. 1195 (1954).

48. 263 U.S. 578 (1924).

49. *Id.* at 582. The law has been altered to some extent by Int. Rev. Code of 1954, § 502 dealing with "Feeder Organizations." Cf. *Veterans Foundation v. United States*, 281 F.2d 912, 913-14 (10th Cir. 1960).

50. *Golden Rule Church Assoc. v. Commissioner*, 41 T.C. 719 (1964). The Golden Rule Church previously had been denied an exemption in *Riker v. Commissioner*, 244 F.2d 220

those who can afford them, and still remain exempt.⁵¹ However, a "profit motive" may defeat the claimed exemption.⁵²

The liberality towards religions extends even to the organizational test. Thus, in *Elisian Guild, Inc. v. United States*,⁵³ a religious organization whose articles did not expressly limit its activities to "exclusively" religious or educational purposes and did not contain an express provision that upon dissolution its funds would go to other exempt organizations, was nevertheless declared exempt. Similarly, *Morey v. Riddell*⁵⁴ held that a church group with no formal name, charter, or headquarters was exempt.⁵⁵ Despite the liberal approach given to the federal statutes granting tax exemptions to religious organizations, a recent circuit court case gave the section a narrow construction, and thereby overlooked several constitutional issues and perhaps foreshadowed an end to the role of religion in politics.

C. Christian Echoes: *Must Religions Be Apolitical?*

The courts rarely have been confronted with the political activity limitation question as applied to a religious organization; moreover, even when so confronted, liberal construction of the statute has allowed them to avoid the thorny constitutional issues. For example, in *Lord's Day Alliance v. United States*,⁵⁶ a religious organization's purpose was to promote the observance of the Sabbath; consequently, it actively opposed legislation which permitted commercial activity on Sunday. Nevertheless, it was held exempt on the grounds

(9th Cir.), cert. denied, 355 U.S. 839 (1957). The later case distinguished *Golden Rule* from *Riker* on the facts and indicated that its decision was based largely on first amendment arguments not raised in the earlier litigation. See 41 T.C. at 729-31.

51. *Passaic United Hebrew Burial Ass'n v. United States*, 216 F. Supp. 500 (D.N.J. 1963).

52. In *Scripture Press Foundation v. United States*, 285 F.2d 800 (Ct. Cl. 1961), cert. denied, 368 U.S. 985 (1962), a publisher of religious books was denied an exemption when it appeared that the income from the sale of books was 20 times greater than the amount spent on the educational programs he claimed to support. "Piety is no defense to the assessments of the tax collector." *Id.* at 804. *Fides Publishers Ass'n v. United States*, 263 F. Supp. 924 (N.D. Ind. 1967), decided a similar factual situation in the same manner. In both cases, however, the publishers were not affiliated directly with any religious organization. Similarly, in *Parker v. Commissioner*, 365 F.2d 792 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967), the court denied the exemption where the Foundation for Divine Meditation sponsored literature concerned with the secrets of wealth and how to make large profits. *Id.* at 797-98.

53. 412 F.2d 121 (1st Cir. 1969).

54. 205 F. Supp. 918 (S.D. Cal. 1962).

55. The court, as did those in *Scriptures* and *Fides*, found the size of the profit to be an important factor in its decision. This departure from the normal rules of statutory construction seems to indicate that the courts are not satisfied with the guidelines established in the regulations. Instead they appear to resort to an intuitive sense of what is or is not an organization operated "exclusively" for religious purposes. Since the first amendment is always at least a tangential issue, the liberality and caution of the courts appear to be justified.

56. 65 F. Supp. 62 (E.D. Pa. 1946).

that its activities were insubstantial and incidental. Although the reasoning appears strained,⁵⁷ the result appears consistent with the approaches taken by other courts.

Against this tranquil background of liberal construction and avoidance of constitutional issues, the Tenth Circuit, in *Christian Echoes National Ministry, Inc. v. United States*,⁵⁸ hurled a thunderbolt which is likely to be heard wherever the faithful congregate.

Christian Echoes is an evangelical sect whose religion consists of an amalgam of revivalism and anti-communism.⁵⁹ It has several publications, sponsors radio sermons, revivals, weekly religious services, a religious camp and a church college.⁶⁰ Its founder and leader is Dr. Billy James Hargis. Christian Echoes received a religious tax exemption in 1953, but following an extensive review of its activities, the Internal Revenue Service revoked the exemption in 1966, alleging violation of the political activity limitation contained in section 501(c)(3). After paying the assessed social security tax deficiency, Christian Echoes brought suit for a refund in the district court,⁶¹ and its position was sustained. On appeal, the Tenth Circuit reversed.⁶²

Christian Echoes did not involve a determination as to whether the taxpayer was a religious organization, for the government, perhaps deliberately,⁶³ was "willing to assume that all of [Christian Echoes'] activities were part of its 'religion,' and thus this Court need not reach the question of whether taxpayer is operated exclusively for religious purposes"⁶⁴ Thus the denial of the exemption, in effect, penalized a conceded religious organization for its

57. The general secretary of the organization testified before the state legislature and kept voting records of legislators on bills of interest which the organization distributed "without comment" to those who requested them. The court noted that legislative activity was prominent during only about two months of each year. However, that was true primarily because the state legislature only met for two months during each year. *Id.* at 63.

58. 470 F.2d 849 (10th Cir. 1972), cert. denied, 94 S. Ct. 41 (1973).

59. See 470 F.2d at 851-52; Hargis, *Fear is Ruining America*, *Christian Crusade Weekly*, Aug. 26, 1973, at 10.

60. Brief for Appellee at 9-12, *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972).

61. No. 67-C-114 (N.D. Okla., June 24, 1971).

62. The government filed a direct appeal from the district court ruling to the Supreme Court on the ground that § 501(c)(3) had been ruled unconstitutional. The Court, at 404 U.S. 561 (1972) (*per curiam*), ruled that the activity of the IRS, and not the statute, had been found unconstitutional, and it remanded the case. The government then appealed to the Tenth Circuit.

63. See note 19 *supra*.

64. Brief for Appellant at 28 n.12. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972). To some extent, the government was in an uncomfortable position. If it attacked *Christian Echoes* as not being bona fide religious, it would get involved in serious constitutional problems. See note 19 *supra* and accompanying text. By avoiding this issue, it penalized a religious belief. Apparently, it found it easier to convince the court that it was not doing the latter, thereby avoiding its own introduction of the religious issue into the case.

religiously motivated activities. Considering the approach to this problem used by other courts,⁶⁵ such a result appears unique. However, its startling departure from precedent becomes fully comprehensible only when the factual basis for the holding is clarified.

The government in *Christian Echoes* persuaded the court that the exemption could be revoked for *indirect* political activity, arguing that the section 501(c)(3) disqualification "is not limited to direct dealings with legislators . . ." ⁶⁶ but includes "grassroots lobbying." ⁶⁷ The circuit court adopted this broad interpretation, finding that *Christian Echoes* made numerous attempts "to influence legislation through an indirect campaign to mold public opinion." ⁶⁸ Since this means that an exempt organization which expresses opinions that might have a bearing on legislation is subject to loss of the exemption, it appears to go beyond the statutory language and the explicit standards set forth in the Treasury regulations. ⁶⁹

The government also argued that the prohibition on intervention in political campaigns should be interpreted broadly, stating:

Petitioner's intervention in political campaigns, although indirect, was similarly pervasive. It engaged in a year-round mass media effort, often in connection with specific campaigns, to oppose all "liberal" candidates and place in their stead candidates with a "conservative" outlook. In practical effect, petitioner's opposition to "liberals" amounted to support for their "conservative" adversaries. ⁷⁰

The district court, on the contrary, supported the constitutional arguments of *Christian Echoes*, stating:

The activities of plaintiff are singularly motivated by the sincere religious conviction of plaintiff's followers. The Court having found as fact that plaintiff through its followers believes in the religious nature of its activities, neither defendant nor this Court may inquire into such activities . . . for the purpose of denying tax exempt status to plaintiff.

Defendant, in its application of 501(c)(3) of the Internal Revenue Code . . . has denied the free exercise of religion to, and discriminated against, plaintiff. ⁷¹

The circuit court, on the other hand, paraphrasing the government's brief, held that "[a] religious organization that engages in substantial activity aimed at

65. See note 37 *supra* and accompanying text.

66. Brief for Appellant at 18, *United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561 (1972).

67. Brief for Appellant at 36, *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972). But see Rev. Rul. 306, 1968-1 Cum. Bull. 257, which states that a non-profit corporation publishing a newspaper with church news and some editorials and feature stories is entitled to an exemption.

68. 470 F.2d at 855.

69. See note 20 *supra*.

70. Respondent's Brief for Certiorari at 10, *United States v. Christian Echoes Nat'l Ministry, Inc.*, 94 S. Ct. 41 (1973).

71. No. 67-C-114 at 30-31 (N.D. Okla., June 24, 1971).

influencing legislation is disqualified from tax exemption, whatever the motivation."⁷²

The *Christian Echoes* holding is unsound in several respects. The court reasoned that the revocation of the exemption did not penalize the organization for its religious beliefs, since it could continue its activities under a non-exempt status.⁷³ This squarely contradicts another court,⁷⁴ and ignores the economic realities of religious organizations. Similarly, the decision, contrary to current Supreme Court holdings,⁷⁵ reiterated the discredited right-privilege distinction in upholding the validity of the conditions placed upon the exemption.⁷⁶

The decision, by viewing the section 501(c)(3) limitation as embracing "indirect" activity, goes beyond the construction previously given the statute by other courts and by the existing Treasury regulations.⁷⁷ By expanding the activity which acts as a disqualification to include grass roots lobbying, it conditions the tax exemption upon a very broad self-censorship which clearly raises first amendment problems.⁷⁸ Moreover, the court misapplied the first amendment in concluding that the political activity limitation reflects a "compelling"⁷⁹ governmental interest in maintaining the separation of church and state, since it is clear that the compelling interest espoused in the first amendment is to preserve congressional neutrality towards religion.⁸⁰

Finally, the *Christian Echoes* holding does not take into account the nature of American society or its religious beliefs.

Religion includes a way of life as well as beliefs upon the nature of the world and the admonitions to be "Doers of the word and not hearers only" (James 1:22) and "Go ye therefore, and teach all nations . . ." (Matthew 28:19) are as old as the Christian Church. The step from acceptance by the believer to his seeking to

72. 470 F.2d at 854; see Brief for Appellant at 35, *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972).

73. 470 F.2d at 857.

74. In *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970), a case involving tax exemptions for segregated schools (which were ultimately disallowed on equal protection grounds), the court noted that "[t]he general significance of these tax deductions as supportive of the pertinent activity can hardly be gainsaid, and may, indeed, be the subject of judicial notice." *Id.* at 1134.

75. The Supreme Court, in upholding the right of an alien to collect welfare benefits, stated in *Graham v. Richardson*, 403 U.S. 365, 374 (1971) that "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"

76. 470 F.2d at 857.

77. See note 20 *supra*.

78. See *N.Y. Times*, Oct. 14, 1973, § 1, at 53, col. 6, wherein a high official of the National Council of Churches, commenting on the *Christian Echoes* case, was quoted as follows: "If a minister can no longer preach on any issue that involves legislation . . . then he cannot take a stand for or against abortion, for or against capital punishment or any other national moral issue and enjoy tax-exempt status."

79. 470 F.2d at 857.

80. The amendment does not say that religions shall not attempt to have Congress enact laws favorable to them.

influence others in the same direction is a perfectly natural one, and it is found in countless religious groups. The next step, equally natural, is to secure the sanction of organized society for or against certain outward practices thought to be essential. Thus we had Sunday observance laws The advocacy of such regulation [prohibition] before party committees and legislative bodies is a part of the achievement of the desired result in a democracy. *The safeguards against its undue extension lie in counter-pressures by groups who think differently and the constitutional protection, applied by courts, to check that which interferes with freedom of religion for any.*⁸¹

II. SECTION 501(c)(3): FREE EXERCISE LIMITATIONS

The free exercise clause, a product of the struggle for independence,⁸² was incorporated into the Constitution to ensure the right to observe religious beliefs without governmental hindrance. Section 501(c)(3), as construed in *Christian Echoes*, may restrain many religious groups from pursuing religiously motivated goals. Such a restraint on its face arguably conflicts with the very essence of the right to exercise religious beliefs freely. However, since no right is absolute, and since statutes are to be construed as constitutional whenever possible,⁸³ the facial invalidity of section 501(c)(3) must be viewed within the framework of the Supreme Court's approach to statutes raising free exercise issues.

A. *The Requirements of Free Exercise*

One of the essential characteristics of the free exercise clause is that it prohibits the government from coercing individuals to engage in activities that violate their religious beliefs. The Supreme Court has stated that its purpose "is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."⁸⁴ As a result, an individual cannot be compelled to salute the flag if this act conflicts with his religious beliefs.⁸⁵ "If there is any fixed star in our constitutional constellation, it is that no official, high

81. *Girard Trust Co. v. Commissioner*, 122 F.2d 108, 110 (3d Cir. 1941) (emphasis added). The case upheld the deductibility of a bequest to a prohibition group, but did not involve a statute with an express political limitation.

82. P. Miller, *The Life of the Mind in America* 36 (1965). Historical approaches frequently lead to conflicting conclusions. Compare *Everson v. Board of Educ.*, 330 U.S. 1, 33-43 (1947) (Rutledge, J., dissenting) with *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 244-48 (1948) (Reed, J., dissenting).

83. See, e.g., *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

84. *School District v. Schempp*, 374 U.S. 203, 223 (1963).

85. *Board of Educ. v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940). *Gobitis* involved a suit to enjoin enforcement of the mandatory flag salute requirement; no criminal penalty was involved. In *Barnette*, children were being expelled and criminal sanctions were being employed. 319 U.S. at 630. The presence of a criminal penalty may well be a significant factor in influencing the Court, although it is certainly not definitive.

or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"⁸⁶ Consequently, an individual who possesses a religious conviction to the effect that he cannot judge others may not be compelled to serve on a jury.⁸⁷ More recently, in *Wisconsin v. Yoder*,⁸⁸ the Amish successfully maintained that their religion prevented compliance with a uniform state compulsory school attendance law.

The free exercise clause not only prevents the government from forcing an individual to act in contravention of his religious beliefs, but it also limits the power of the state to regulate actions which are religiously inspired or motivated. Thus in *Cantwell v. Connecticut*,⁸⁹ a state statute which prohibited soliciting by religious organizations without prior approval and determination of the legitimacy of the organization was invalidated by the Court. The Court found two salient reasons for concluding that the right to spread one's religion limited the policing powers of the state:

On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act.⁹⁰

Consequently, a political unit cannot ban the distribution of religious literature,⁹¹ although other types of door to door solicitation can be regulated.⁹² Recently, the Supreme Court suggested that the right of a prisoner to have access to religious literature of his choice and to his religious advisor cannot be abridged.⁹³ One religious group has been permitted to use an otherwise

86. 319 U.S. at 642. See also *Sheldon v. Fannin*, 221 F. Supp. 766 (D. Ariz. 1963), where the court upheld the right of some Jehovah's Witnesses to refuse to sing the National Anthem. "[W]e so prize freedom . . . that the bounds of restraint upon First Amendment rights which will be tolerated as reasonable are narrow in the extreme." *Id.* at 773. Thus, when "a particular application of a general law not protective of some fundamental State concern materially abridges free expression or practice of religious belief, then the law must give way to the exercise of religion." *Id.* at 774.

87. *In re Jenison*, 375 U.S. 14 (1963) (per curiam) (remanding for further consideration). The Minnesota Supreme Court, in 267 Minn. 136, 125 N.W.2d 588 (1963), reversed its earlier holding and ruled that jury service could not be required of one who had a religious belief which prohibited such service. For a discussion of the problem of attempting to administer blood transfusions to those who refuse them on religious grounds see 41 *Fordham L. Rev.* 158 (1972).

88. 406 U.S. 205 (1972).

89. 310 U.S. 296 (1940).

90. *Id.* at 303.

91. See *Marsh v. Alabama*, 326 U.S. 501 (1946); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

92. *Breard v. Alexandria*, 341 U.S. 622 (1951), for example, upheld a statute which prohibited the door to door commercial sale of magazines without the prior consent of the owner.

93. *Cruz v. Beto*, 405 U.S. 319 (1972), held that petitioner, a Buddhist, had raised a

prohibited drug in its religious service.⁹⁴ Thus, with certain exceptions,⁹⁵ one can both act and refuse to act on the basis of religious belief without governmental interference.

On the other hand, the first amendment does not protect all religiously motivated activity. When the state interest is strong enough, religion must yield to regulation. Thus, the Supreme Court early ruled that the first amendment is no bar to the prohibition of the practice of polygamy by Mormons.⁹⁶ Similarly, a state regulation of child labor can prohibit a young girl from selling religious literature.⁹⁷ The balancing of interests "between these [religious] freedoms and an exercise of state authority always is delicate."⁹⁸ To resolve such delicate disputes, there must be a "weighing of two conflicting interests,"⁹⁹ and the state, to prevail, must show an "interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."¹⁰⁰ Thus the interest of the state in maintaining safety and convenience on public streets permits it to require religious organizations to obtain licenses for parades and processions.¹⁰¹ Similarly, Sunday closing laws are sustainable on the ground that the state has a strong interest in prescribing one uniform day of rest.¹⁰²

Earlier court decisions indicated that government could impinge upon first

constitutional question in his allegations that the state prison to which he was confined did not permit him to have the same opportunity to practice his religion as it gave to those of other religious denominations.

94. *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). There, the California Supreme Court decided that the state could not force members of the Native American Church to stop using peyote which they believe allows a direct communication with God. A similar issue occurred in *Native American Church, Inc. v. Arizona Corp. Comm'n*, 329 F. Supp. 907 (D. Ariz. 1971), *aff'd mem.*, 405 U.S. 901 (1972). There, however, the petitioner was denied a certificate of incorporation because its charter included an illegal purpose, i.e., the use of peyote. The refusal was upheld on the grounds that there were no allegations that the Arizona prohibition on the use of peyote had been enforced against petitioner, and there was no evidence that denial of a certificate of incorporation would interfere with its free exercise of religion.

95. See text beginning at note 96 *infra*.

96. *Reynolds v. United States*, 98 U.S. 145 (1878); accord, *Cleveland v. United States*, 329 U.S. 14 (1946).

97. *Prince v. Massachusetts*, 321 U.S. 158 (1944), where the Court enforced the child labor statute despite the fact that the girl was under adult supervision.

98. *Id.* at 165.

99. *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

100. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

101. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

102. *Braunfeld v. Brown*, 366 U.S. 599 (1961). See also *Gallagher v. Crown Kasher Mkt.*, 366 U.S. 617 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961). These decisions have been criticized. See *Sherbert v. Verner*, 374 U.S. 398, 417-18 (1963) (Stewart, J., concurring); 3 Wm. & Mary L. Rev. 384 (1962). Disregarding the Court's strained reasoning in *Braunfeld* which did not choose to find the choice of Sunday as the uniform day of rest to have been the result of religious considerations, the decisions appear correct inasmuch as the petitioners were not compelled by their religious beliefs to work on Sunday.

amendment rights without a real showing of a compelling interest where the conditioned activity was viewed as a privilege rather than a right.¹⁰³ This "right-privilege" distinction¹⁰⁴ was rejected emphatically in *Sherbert v. Verner*.¹⁰⁵ There, a Seventh-day Adventist was denied unemployment compensation because she refused to accept a job which would have required her to work on Saturday in violation of her religious beliefs. The Supreme Court held that the free exercise clause was violated. "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."¹⁰⁶ There was no "compelling state interest"¹⁰⁷ which would justify the actions of the state. Moreover, the Court stated that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."¹⁰⁸ Thus, "free exercise has become the favored child of the first amendment."¹⁰⁹

Of course, "to have the protection of the Religion Clauses, the claims must be rooted in religious belief."¹¹⁰ However, heretofore the courts have been reluctant to determine what is or is not a religious belief. In *United States v. Ballard*,¹¹¹ a mail fraud prosecution against the "I Am" movement, the Court stated that the truth or falsity of religious beliefs could not be submitted to a jury. When Rhode Island claimed that a Jehovah's Witness meeting in a park was not a religious service,¹¹² the judicial response was that "it is no business of courts to say that what is a religious practice or activity for one group is not

103. See Willcox, *Invasions of the First Amendment Through Conditioned Public Spending*, 41 Cornell L.Q. 12 (1955).

104. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968). An example of the right-privilege reasoning is found in *Hamilton v. Regents*, 293 U.S. 245, 262 (1934). In *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972), the court held that an eleventh grade high school student could not be compelled to participate in R.O.T.C. as a condition to graduation when he demonstrated a strong religious objection to such training. The dissenting opinion felt that *Hamilton* compelled a different result. *Id.* at 800-02. Similarly, *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (per curiam), cert. denied, 409 U.S. 1076 (1973), noted in 41 Fordham L. Rev. 1015 (1973), which invalidated mandatory chapel attendance at the service academies, did not resort to the right-privilege distinction which might have required a different result.

105. 374 U.S. 398 (1963).

106. *Id.* at 404.

107. *Id.* at 406.

108. *Id.* at 404.

109. Pfeffer, *The Supremacy of Free Exercise*, 61 Geo. L.J. 1115, 1142 (1973).

110. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

111. 322 U.S. 78 (1944). The Ballard Court indicated that a jury can decide if a belief is sincere or is held in good faith.

112. *Fowler v. Rhode Island*, 345 U.S. 67 (1953). Religious groups were granted permission to conduct services in the park. However, the authorities denied this right to the Jehovah's Witnesses, alleging that the talks which they sought to hold were not religious services.

religion under the protection of the First Amendment."¹¹³ The position taken by the Court, that the first amendment bars any inquiry into what is or is not religious places the judiciary in a somewhat ambiguous position when it is called on to decide if a claim is rooted in religious belief. This recurring problem has yet to be resolved.¹¹⁴

The free exercise requirement that, absent a compelling state interest,¹¹⁵ the government cannot force an individual to act or to not act in contravention of his religious beliefs generally has been followed when free exercise claims challenge a taxing statute.

B. Free Exercise and Taxation

In *Murdock v. Pennsylvania*¹¹⁶ the free exercise clause was raised to challenge a statute which imposed a flat fee license tax on all solicitors and canvassers. The Jehovah's Witnesses were found to be protected from the tax since "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature . . . is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types."¹¹⁷ Since "[t]he power to tax the exercise of a privilege is the power to control

113. *Id.* at 70; accord, *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

114. In *United States v. Seeger*, 380 U.S. 163 (1965), the Court devised a test to be applied to those seeking conscientious objector status which could be useful in testing whether a claim is rooted in religious belief. The test "is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." *Id.* at 166. However, the Court appears to have retreated from this test in *Welsh v. United States*, 398 U.S. 333 (1970), where it accepted a strong moral or ethical belief as sufficient to justify the exemption. However, in a well-reasoned concurring opinion, Justice Harlan suggested that the Court should invalidate the statute providing the exemption on establishment grounds. *Id.* at 362. Nonetheless, the majority appears to have construed the statute in such broad terms that the establishment problem has been eliminated to its present satisfaction.

115. See Giannella, *Religious Liberty Nonestablishment, and Doctrinal Development*, 80 *Harv. L. Rev.* 1381, (1967) (discussing the factors involved in weighing the interests of the government and the state). The author identifies three factors which are important in determining the interest of the state in a regulation: the importance of the secular values contained in the regulation; the importance and necessity of the means adopted to achieve the value; and the potential impact of an exemption on the overall purpose of the regulation. Religious claims are evaluated, he suggests, in terms of the sincerity of the belief, the importance of its practice and the extent to which the governmental regulation interferes with the practice. *Id.* at 1390.

116. 319 U.S. 105 (1943).

117. *Id.* at 110. The *Murdock* decision was a companion case to several similar holdings. On the same day, the Court re-decided *Jones v. Opelika*, 316 U.S. 584 (1942), rev'd on rehearing, 319 U.S. 103 (1943), in accordance with the *Murdock* decision. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), the Court similarly invalidated a statute which completely prohibited the door-to-door solicitation and sale of handbills and circulars.

or suppress its enjoyment,"¹¹⁸ it followed that "if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found."¹¹⁹ The *Murdock* holding was reaffirmed shortly thereafter and extended to cover a Jehovah's Witness who made his living from the sale of religious literature but had refused to pay a license tax.¹²⁰

While *Murdock* might be read broadly to suggest that the spreading of religious beliefs is not subject to at least some forms of taxation, it is clear that first amendment protection does not extend to one who refuses to pay income taxes because of a religious opposition to governmental spending policies.¹²¹ Moreover, general economic regulations which conflict with religious beliefs are frequently sustainable. Thus, in *United States v. Kissinger*,¹²² the court upheld a conviction of a wheat producer who claimed on religious grounds that he could not limit his production.

However, tax provisions cannot compel one to act in violation of his religious belief. Moreover, a tax exemption statute, like other statutes providing privileges,¹²³ cannot be made conditional upon one's willingness to violate a religious belief. In *First Unitarian Church v. County of Los Angeles*,¹²⁴ the California Supreme Court upheld the validity of a property tax exemption statute which required the taxpayer to file a loyalty oath, even though the petitioner opposed the oath on religious grounds. Although the Supreme Court of the United States reversed on other grounds,¹²⁵ one Justice stated that "[t]here is no power in our Government to make one bend his religious scruples to the requirements of this tax law."¹²⁶ The companion case to *First Unitarian, Speiser v. Randall*,¹²⁷ made clear that the right-privilege distinction has no force in a tax exemption case raising first amendment issues. The Court found that

118. *Murdock v. Pennsylvania*, 319 U.S. at 112. But see *id.* at 137 (Frankfurter, J., dissenting and citing *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J.): "The power to tax is not the power to destroy while this Court sits.").

119. 319 U.S. at 115. The Court, however, reserved opinion on the validity of income and property taxes. *Id.* at 113.

120. *Follett v. Town of McCormick*, 321 U.S. 573, 576 (1944).

121. *Muste v. Commissioner*, 35 T.C. 913 (1961), in which the devoted pacifist, A. J. Muste, was held liable for the payment of income taxes which he had refused to pay in protest of the war.

122. 250 F.2d 940 (3d Cir. 1958). It should be noted, however, that petitioner was convicted of marketing excess wheat, not of producing it. If the regulation had covered only production, perhaps the result would have been different.

123. See note 104 *supra* and accompanying text.

124. 48 Cal. 2d 419, 311 P.2d 508 (1957), *rev'd*, 357 U.S. 545 (1958).

125. The Court did not have to reach the religious questions raised by petitioner in the Unitarian Church case because the statute under consideration was ruled invalid on due process grounds in the companion case, *Speiser v. Randall*, 357 U.S. 513 (1958).

126. 357 U.S. at 548 (1958) (Douglas, J., concurring). See also *Watchtower Bible & Tract Soc'y v. Los Angeles County*, 30 Cal. 2d 426, 182 P.2d 178, *cert. denied*, 332 U.S. 811 (1947), which conceded that a tax operating as a condition to carrying out a religious activity is unconstitutional.

127. 357 U.S. 513 (1958).

"appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech."¹²⁸ *First Unitarian* makes clear that the issue of free exercise can be raised successfully in proper circumstances to challenge the denial of a tax exemption.

A challenge to the political limitation contained in section 501(c)(3), therefore, must include an assertion that the statute has a coercive effect on the practice of religious beliefs and that the government has no compelling interest in the interference with religion. Only if both assertions are accepted by a court can the statute be invalidated under the free exercise clause.

Arguably, section 501(c)(3) does have a coercive effect on religious organizations. If a religious belief requires speaking out on an issue of political importance but the exemption necessary for the continued existence of the religious organization will be subject to revocation, a religious organization clearly is forced to choose between its religiously motivated beliefs and its continued exemption. Under some circumstances, nearly every religious group will be motivated by sincere belief to engage in substantial political activity.¹²⁹ Moreover, political activity of some sort implicitly is required by many religions;¹³⁰ indeed, a religion which did not have moral standards which it believed should be followed by the society would be an anomaly. When section 501(c)(3) is construed as it was in *Christian Echoes*,¹³¹ the breadth of the coercive effect becomes enormous.

Of course, such reasoning is subject to the limitation that a compelling state interest will justify infringements on free exercise. In fact, however, it will be very difficult for the government to argue that it has a compelling interest in the political limitation of section 501(c)(3) of such a magnitude that the provision should be applied. First, the Internal Revenue Code does not make all exemptions depend on the taxpayer's willingness to refrain from political activity. Section 501 provides an income tax exemption without such condition for many types of organizations.¹³² In addition, section 170 provides individual deductions for contributions to organizations of war veterans, in addition to the 501(c)(3) groups.¹³³ If the government's argument is that there is a compelling interest in having all political competitors compete on

128. *Id.* at 518.

129. One would expect, for example, that the Catholic faith would require its followers to oppose abortion laws. Similarly, it could be expected that organized Judaism would feel compelled to support Israel when that nation were endangered. In both cases, the activities are motivated by a sincere religious belief. See note 78 *supra*. Thus, in some circumstances political activity may be a form of worship.

130. See text accompanying note 81 *supra*.

131. See text accompanying note 58 *supra*.

132. See, e.g., Int. Rev. Code of 1954, §§ 501(c)(5) (labor organizations), 501(c)(6) (business leagues).

133. *Id.* § 170(c)(3). In addition, Congress has altered the statute providing deductions for ordinary and necessary business expenses to permit deductions for expenses incurred in testifying before legislatures on matters of direct interest and communicating on such matters with interested classes. Int. Rev. Code of 1954, § 162(e). This was done to avoid the harsh consequences of *Cammarano v. United States*, 358 U.S. 498 (1959).

equal terms, such an argument is weakened considerably by these provisions. It would also seem ludicrous for the government to argue that it has a compelling interest in maximizing its revenue since the purpose of section 501(c)(3) is to *grant* exemptions. The political condition, moreover, is unrelated to revenue goals.

The government could argue that it has a compelling interest in maintaining the separation of church and state, and that this is promoted by the political limitation. In weighing this claim, two factors are important. First, the first amendment prohibits Congress from establishing a religion; it does not prohibit a religion from attempting to establish itself. Second, the very nature of our political system, with its checks and balances and thousands of competing interest groups, indicates that, at this time, it is most unlikely that any religion could in fact establish itself and in so doing, destroy the wall of separation between church and state. On balance, section 501(c)(3) appears to violate the free exercise clause. As the Supreme Court stated in 1972, "the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not."¹³⁴ Section 501(c)(3) not only interferes with advocacy—it was designed to do so.

III. SECTION 501(c)(3): OTHER CONSTITUTIONAL INFIRMITIES

While section 501(c)(3) appears unconstitutional on free exercise grounds, it also might be challenged successfully on free speech grounds, for the activities prohibited are recognized forms of speech. Moreover, insofar as the section has failed to set a definite standard by which religious organizations can decide what activity will be grounds for revocation of the exemption, it raises the related problem of unconstitutional vagueness. Alternatively, the section might fall in violation of the equal protection clause as discriminatory, or as arbitrarily enforced. Finally, since it requires government supervision of and entanglement in the affairs of religious organizations, the section may be invalid on establishment grounds.

A. *Taxation and Religious Speech*

Whether or not section 501(c)(3) does conflict with the first amendment mandate that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."¹³⁵ depends upon court interpretations of what constitutes an abridgment of protected speech. A discussion of the free speech issue as it relates to the Code, therefore, requires some discussion of court opinions involving the construction of the free speech clause.

First amendment rights enjoy a "preferred position,"¹³⁶ and generally neither Congress nor the states have the power to pass statutes which interfere with

134. *Healy v. James*, 408 U.S. 169, 192 (1972) (holding that an S.D.S. chapter could not be denied recognition as a campus organization unless the college could justify such a refusal on the basis of overt acts or proof of intent to disrupt the campus).

135. U.S. Const. amend. I.

136. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).

the exercise of the right to speak.¹³⁷ Consequently, several tests are applied to claims of governmental interference with this right.

A cardinal rule is that the government cannot prohibit speech before it is uttered. This doctrine of "prior restraint" was developed in *Near v. Minnesota*.¹³⁸ There, a statute, which was ruled invalid, provided that any newspaper which published defamatory matter could be enjoined from publication. The statute, assuming that a newspaper which published such statements in the past would do so in the future, prohibited the publication from all future distribution.

All forms of speech are not protected by the first amendment,¹³⁹ and the government may punish past speech of the unprotected type.¹⁴⁰ However, even a prosecution under a statute for the use of clearly unprotected speech may be reversed and the statute invalidated if it does not by its terms or by court construction limit its applicability to unprotected speech. This "overbreadth doctrine"¹⁴¹ recently was applied in *Gooding v. Wilson*¹⁴² to a conviction for profane and abusive language¹⁴³ with the result that the entire statute was invalidated because it did not narrow sufficiently the types of language punishable to those which in fact were unprotected.

The overbreadth doctrine is related closely to the void-for-vagueness doctrine.¹⁴⁴ The latter doctrine means that a statute aimed at punishing unprotected speech cannot be written in such a fashion that it will discourage people from engaging in protected speech out of fear that the vaguely worded statute could be read as prohibiting what would otherwise be permissible speech. Thus, in *Smith v. California*,¹⁴⁵ a statute which made booksellers liable if they had obscene material in their stores was invalidated since the statute did not require actual knowledge of the contents of a book and did not provide a sufficient standard for knowing what was obscene. The statute was held to have had a "chilling effect"¹⁴⁶ on the booksellers, since it tended to discourage them from stocking much literature which in fact was not obscene.

Whereas pure speech is protected,¹⁴⁷ the first amendment does not bar all

137. *Near v. Minnesota*, 283 U.S. 697 (1931).

138. 283 U.S. 697 (1931); accord, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

139. See, e.g., *Miller v. California*, 93 S. Ct. 2607 (1973) (obscenity); note 140 *infra* (libel); note 154 *infra* (inciting words).

140. *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding a criminal libel statute).

141. See Comment, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970). But cf. *Broadrick v. Oklahoma*, 93 S. Ct. 2908, 2915-19 (1973); Comment, *The Hatch Act Reaffirmed: Demise of Overbreadth Review?*, 42 Fordham L. Rev. 161 (1973).

142. 405 U.S. 518, 521 (1972).

143. *Id.* at 534 (Blackmun, J., dissenting).

144. See Comment, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 873 (1970).

145. 361 U.S. 147 (1959).

146. *Id.* at 153. The chilling effect is a factor in many cases. See, e.g., *Laird v. Tatum*, 408 U.S. 1 (1972); *In re Stolar*, 401 U.S. 23, 27-28 (1971); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965).

147. Symbolic speech may be protected as well. *Tinker v. Des Moines School Dist.*, 393

governmental regulation of speech, just as it does not bar all governmental regulation of religion.¹⁴⁸ Beginning with *Schenck v. United States*,¹⁴⁹ which espoused the "clear and present danger"¹⁵⁰ test, the Court has struggled to provide standards for determining when a governmental infringement upon free speech is permissible.¹⁵¹ Thus in *Chaplinsky v. New Hampshire*,¹⁵² a conviction for illegal speech was sustained because the state court had construed the statute's restriction on provocative language to apply only to "fighting words." However, when, as in *Gooding v. Wilson*,¹⁵³ the statute has not been limited to "fighting words," it will not be sustained, even if the actual words were outrageous. Although *Brandenburg v. Ohio*¹⁵⁴ stated that speech is protected except where "advocacy is directed to inciting or producing imminent lawless action,"¹⁵⁵ an exception to this approach appeared when a statute requiring civil service employees to be non-partisan and to refrain from most forms of political speech again was held valid¹⁵⁶ in 1973 in *United States Civil Service Commission v. National Association of Letter Carriers*,¹⁵⁷ and *Broadrick v. Oklahoma*,¹⁵⁸ on the ground that the governmental interest in having a non partisan civil service was of such magnitude that it overrode the first amendment. The Court in *Broadrick* noted that "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs"¹⁵⁹

Inasmuch as the free speech rights of a religious organization involve *two* first amendment rights, arguably an even more compelling state interest would be required to justify restrictions. *Cantwell v. Connecticut*¹⁶⁰ clearly established that a religion is entitled to protection of its speech, for the Court observed

U.S. 503 (1969) (wearing armbands to protest the Vietnam War protected under the first amendment); *James v. Board of Educ.*, 461 F.2d 566 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1973) (teacher has same right to wear armband as form of symbolic speech); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (leafleting against a real estate broker protected even though it invaded broker's privacy).

148. See note 96 *supra* and accompanying text.

149. 249 U.S. 47 (1919).

150. *Id.* at 52.

151. See generally *Thomas v. Collins*, 323 U.S. 516 (1945); *Whitney v. California*, 274 U.S. 357 (1927), overruled by *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); T. Emerson, *The System of Freedom of Expression* (1970).

152. 315 U.S. 568 (1942); see Comment, *Violence and Obscenity—Chaplinsky Revisited*, 42 *Fordham L. Rev.* 141 (1973).

153. 405 U.S. 518, 522 (1972) (discussed in text accompanying notes 142-43 *supra*).

154. 395 U.S. 444 (1969).

155. *Id.* at 447.

156. Initially it was held valid in *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

157. 93 S. Ct. 2880 (1973).

158. 93 S. Ct. 2908 (1973).

159. *Id.* at 2915 (emphasis added).

160. 310 U.S. 296 (1940). See discussion at notes 89-90 *supra* and accompanying text.

that "a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment"¹⁶¹ Moreover, "the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible."¹⁶² *Cantwell* and its progeny¹⁶³ indicate that the Supreme Court will take a dim view of any prior restraint of religious expression. "Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful."¹⁶⁴

The broad protection given to speech does not, however, immunize it from taxation.¹⁶⁵ This does not mean, as *Speiser v. Randall*¹⁶⁶ made clear, that a tax exemption may be made conditional on the willingness of the taxpayer to take an oath. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."¹⁶⁷ Nor does it mean that there is an obligation on the part of the government to grant tax relief for activities which involve permissible forms of speech. Thus, in *Cammarano v. United States*,¹⁶⁸ the petitioner argued that he should be allowed a deduction as an ordinary and necessary business expense for funds spent by him to defeat legislation which would have put him out of business. The Supreme Court denied that his argument presented a first amendment issue, stating that "[p]etitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code."¹⁶⁹

In the section 501(c)(3) situation, however, the exemption can be denied

161. 310 U.S. at 305.

162. *Id.* at 306.

163. See *Niemotko v. Maryland*, 340 U.S. 268 (1951) (denial of a permit for lecture on the Bible held unconstitutional since there were no standards for granting or denying such permits); cf. *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) ("clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not . . .").

164. *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943).

165. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The case invalidated a discriminatory license tax.

166. 357 U.S. 513 (1958) (discussed in text accompanying notes 127-28 *supra*).

167. *Id.* at 518.

168. 358 U.S. 498 (1959).

169. *Id.* at 513. One justice suggested that "[i]f Congress had gone so far as to deny all deductions for 'ordinary and necessary business expenses' if a taxpayer spent money to promote or oppose initiative measures, then it would be placing a penalty on the exercise of First Amendment rights." *Id.* at 515 (Douglas, J., concurring). A similar problem is suggested by section 501(c)(3), since, for example, a religious organization which devotes 85 percent of its time and money to purely "religious" affairs and the remainder to "influencing legislation" might well lose its entire exemption, and contributors would be denied any deduction.

precisely because an organization engages in certain constitutionally protected activities. It is submitted that this is the critical factor distinguishing *Cammarano* from cases like *Speiser*. In *Cammarano*, the deduction is conditioned upon the definitions of "ordinary and necessary business expenses" found in the Code. In the section 501(c)(3) situation, the exemption is expressly conditioned upon refraining from a form of expression. Even assuming *arguendo* that section 501(c)(3) implicitly defines a "religious organization" as one which does not engage in substantial political activity, the establishment clause would prohibit such a definition since it would operate to discriminate among religious organizations.¹⁷⁰ Moreover, it seems implausible to construe this political limitation as an integral part of the definition of a "religious organization" since the Code and its regulations suggest that an organization may be bona fide "religious" and yet fail to qualify for an exemption because of its political activity.¹⁷¹

It therefore appears that section 501(c)(3) is invalid on free speech grounds. It has elements of a "prior restraint" since loss of exemption for any religious organization would probably lead to the organization's demise and silence. Moreover, it may suffer from "overbreadth" in that it applies on its face to speech which Congress has no right to limit.¹⁷² Furthermore, the organizational test, by permitting denial or revocation of the exemption without any political activity, gives added impetus to the overbreadth argument. The statute is equally vulnerable on grounds of vagueness. Neither the statute nor the judicial gloss defines what activity would justify revocation of an exemption. Hence, it certainly may have a chilling effect on all religious organizations, for they may well forego acceptable religiously motivated political activity for fear that they will lose their exemptions. Thus, section 501(c)(3) would appear to be clearly an unconstitutional condition to the granting of a privilege.¹⁷³ In addition, it does not limit itself to words of incitement, and does not evidence any compelling governmental interest. In fact, the compelling interest runs the other way: "the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies."¹⁷⁴

170. See text accompanying note 19 *supra*.

171. *Accord*, *Trinidad v. Sagrada Orden*, 263 U.S. 578, 581 (1924). See the discussion of *Christian Echoes*, note 64 *supra* and accompanying text.

172. While presumably a sermon or series of sermons which touched upon political subjects would not amount to "propaganda" as used in the statute, nothing in the statute prevents such an interpretation by the court.

173. See note 104 *supra* and accompanying text.

174. *Dennis v. United States*, 341 U.S. 494, 503 (1951); cf. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In the latter case, the Court refused to permit a suit under the Sherman Act which alleged that the railroads sought to create a monopoly by lobbying and conducting publicity campaigns. Emphasizing that the right to petition the government was protected, the Court construed the Act to avoid conflict with a congressional policy against restricting political activity. *Id.* at 137-39.

B. *Equal Protection Issues*

The Constitution requires that laws be enforced with uniformity. While tax statutes rarely are found to violate equal protection,¹⁷⁵ it is nevertheless true that "[t]ax exemptions are subject to the limitation that they and the classification upon which they are based be reasonable, not arbitrary, and apply to all persons similarly situated."¹⁷⁶ Thus, the Supreme Court has stated that discrimination based on "differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers . . . would be . . . a denial of the equal protection of the laws to the less favored classes."¹⁷⁷

Consequently, it appears that section 501(c)(3) could be invalidated on equal protection grounds as well, since it suffers from several equal protection infirmities. First, it may contain an "under-inclusion"¹⁷⁸ problem, since, as has already been pointed out,¹⁷⁹ the Code does not place a broad limitation on political activity as a condition to exemption for business leagues, veterans' organizations, and labor organizations. Second, attempts to enforce the limitation against religious organizations arguably would amount to religious discrimination, since the statute is for all practical purposes not enforced, despite numerous blatant violations.¹⁸⁰ Finally, a recent court concluded that, insofar as it uses a sub-

175. See R. Harris, *The Quest for Equality* 72 (1960). While there is no equal protection clause in the Bill of Rights, the Court has indicated that the equal protection clause of the fourteenth amendment includes at least to some extent the fifth amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

176. *United States v. Department of Revenue*, 202 F. Supp. 757, 759 (N.D. Ill.), *aff'd per curiam*, 371 U.S. 21 (1962).

177. *American Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900).

178. See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1084 (1969).

179. See note 24 *supra* and accompanying text.

180. A few recent examples should suffice. (All of the organizations hereinafter discussed are tax exempt under § 501(c)(3)). See U.S. Dep't of the Treas., *Cumulative List of Exempt Organizations* (Int. Rev. Serv. Pub. No. 78) (tentative list 1972). They have remained so despite politically oriented activity.) For examples, see N.Y. Times, June 30, 1971, at 42, col. 1 (United Church of Christ, a large Protestant organization, ended its meeting "after calling for the repeal of all legal prohibitions of physician-performed abortions" and taking positions on secret documents, Vietnam, and diplomatic recognition of China); N.Y. Times, May 9, 1971, at 8, col. 1 (Rabbinical Council of America asked legislators to reexamine their abortion philosophy); N.Y. Times, Jan. 26, 1971, at 67, col. 1 (Cardinal Cooke wrote Governor Rockefeller on behalf of the bishops of New York, urging him "to support . . . the immediate passage of substantial assistance to non-public . . . education." *Id.* at col. 3); N.Y. Times, Jan. 29, 1971, at 27, col. 1 (American Jewish Congress endorsed state aid to parochial schools). These organizations remain exempt despite their activities and the protestations of some members of Congress. See 115 Cong. Rec. 38,887 (1969), wherein Representative Blackburn protested lobbying by the United Church of Christ and forwarded an example to the Internal Revenue Service. The National Council of Churches was similarly attacked by Representative Rarick under the general heading of "Tax-Exempt Liberal

stantiality test, section 501(c)(3) raises equal protection issues since that test allows a large organization to devote considerable time and money to political activity, while a small religious organization can lose its exemption for a comparatively insignificant amount of activity.¹⁸¹

C. *Enforcement, Entanglement, and Establishment*

Since section 501(c)(3) requires an inquiry into the activities and financial affairs of a religious organization in order to determine if a substantial amount of its business is devoted to political activity, it appears to be in conflict with recent Court pronouncements on the establishment clause. Legislation affecting religion must reflect a secular legislative purpose; its primary effect must neither advance nor inhibit religion, and it must not entangle the government in religious affairs.¹⁸² The latter requirement was used by the Court to justify the granting of property tax exemptions to churches,¹⁸³ and therefore appears applicable to section 501(c)(3), the rationale being that extensive surveillance of and inquiry into the financial aspects of a religious organization tends to involve the state unduly in religious affairs. In *Christian Echoes*, for example, the government spent hundreds of hours in making four reviews of the organization's records within a two year period.¹⁸⁴ The establishment clause may well require an approach to the tax exemption which involves far less than this degree of entanglement.

IV. CONCLUSION

The political activity limitation imposed as a condition to tax exempt status for religious organizations violates the constitutional prohibitions against legisla-

Churches Finance Revolution." *Id.* at 22,650. See also R. Morgan, *The Politics of Religious Conflict* 49-68 (1968).

It is difficult, however, to convince a court that a statute should not be allowed because it generally is not enforced. In *Moss v. Hornig*, 314 F.2d 89 (2d Cir. 1963), the court held that mere knowledge by the state of other violators of a Sunday closing law, without a showing of purposeful discrimination, did not violate equal protection. Arbitrary classifications, on the other hand, have greater weight in an equal protection case. In *Police Dep't v. Mosley*, 408 U.S. 92, 102 (1972), the Court held that a city could not limit picketing outside schools to labor organizations without violating the rights of civil rights demonstrators.

181. "Americans United," *Inc. v. Walters*, 477 F.2d 1169 (D.C. Cir.), cert. granted, 412 U.S. 927 (1973) (No. 72-1371). The case is discussed in Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, N.Y.U. 31st Inst. on Fed. Tax. 1415, 1435-36 (1973) [hereinafter cited as Troyer].

182. *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

183. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

184. See *Christian Echoes Nat'l Ministry, Inc. v. United States*, 67-C-114, at 10-15, Findings of Fact (N.D. Okla., June 24, 1971), rev'd, 470 F.2d 849 (10th Cir. 1972), cert. denied, 94 S. Ct. 41 (1973). The Supreme Court's refusal to review the case may in part be explained by the fact that the lower court litigation centered upon the constitutionality of the application of § 501(c)(3) by the IRS, and not on the constitutionality of § 501(c)(3) per se. See Brief for Appellee at 6, *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 ("Issues Presented").

tion which infringes upon freedom of speech, religion, and petitioning the government, and denies such organizations the equal protection of the laws. Of even greater importance is the fact that it does not serve a legitimate purpose. In a pluralistic society based on democratic principles, the interchange of ideas is the catalyst which provides the vitality and wisdom necessary to find the means to accommodate diversity. To suppress, even indirectly, any fountain of ideas in that society is to subvert it. On policy grounds alone, there are strong arguments for rewriting the statute.

Congress, it is submitted, ought to revise section 501(c)(3) and its counterparts in other sections of the Code in order to create more reasonable standards while still avoiding the undesirable consequences of permitting religious organizations carte blanche in their political activities. The Muskie proposal,¹⁸⁵ which would permit direct lobbying and communication with membership on matters of "direct" interest, would represent an improvement. As far as the political activities of a religious organization are concerned, the only legitimate congressional interest is to ensure that none of its funds are donated to non-exempt organizations or to candidates for public office. Short of these, any political activity which is religiously motivated should be permitted.

At the same time, Congress could amend the individual contributor's deduction sections so as to provide that contributions to groups whose lobbying activities could result in legislation which might inure directly or indirectly to the economic benefit of the donee would not be deductible. Similarly, contributions above a fairly low dollar amount could be made deductible only if the donor stipulated either that the funds not be used for lobbying or that the funds could be used only for certain exempt purposes.¹⁸⁶ This would impose a fiduciary obligation on the receiving organization and would probably discourage it from becoming more political than religious. Gifts made without such conditions would be nondeductible. This approach would prevent large donors from using religious organizations to promote their social or political views. It would also eliminate the need for detailed examination of religious organizations to ensure compliance with the present political activity limitation clause. Finally, it would enable the law to conform both to the Constitution and the realities of organized religious practice.

Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs *amici*, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right.¹⁸⁷

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185. See note 28 *supra*.

186. For example, a merchant might be barred from taking a deduction for contributions to a religious organization which was lobbying for repeal of Sunday closing laws. Similarly, a requirement that the donor stipulate the purpose for which his gift could be used, such as supporting a parochial school, erecting a church or religious school, paying a minister, etc., could be required in order for him to get a deduction.

187. *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970). Several authors recently have argued that § 501(c)(3)'s political limitation is unconstitutional as to all § 501(c)(3) organizations. See Troyer, note 181 *supra*; 3 N.Y.U. Rev. L. & Soc. Change 159 (1973). How-

ever, other § 501(c)(3) organizations face three additional problems. First, while Congress is restricted in its power to define a religious organization, it is free to define a charitable or educational one. The government could argue that a politically active organization is not, by statutory definition, charitable, and therefore cannot claim an exemption. Second, while the religious clauses arguably prevent giving an exemption to some religious organizations and denying the exemption to others, other organizations cannot claim this special status. Finally, political activity by other § 501(c)(3) organizations may exceed the scope of their powers. Such organizations are subject to strict supervision and severe sanctions under many state statutes. See Greenfield, *The New York Statute for Supervision of Trustees for Charitable Purposes*, Eighth Biennial Conference on Charitable Foundations 169, 171 et seq. (1967). The states may not feel that religiously motivated political activity constitutes an abuse of the function of a religious organization.